

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

January 13, 2009 Session

STATE OF TENNESSEE v. MARK ANTHONY KING

Direct Appeal from the Criminal Court for Sumner County
No. 3-2007 Dee David Gay, Judge

No. M2008-00033-CCA-R3-CD - Filed April 30, 2009

A jury convicted the Defendant, Mark Anthony King, of felony evading arrest and reckless endangerment, and the trial court sentenced the Defendant as a Range II, multiple offender to a total effective sentence of eight years in the Tennessee Department of Correction. The Defendant filed an untimely motion for new trial, which the trial court denied after a hearing. The Defendant then filed an untimely notice of appeal. On appeal, the Defendant contends: (1) the trial court erred when it refused to remand the Defendant's case to general sessions court for a preliminary hearing; (2) the trial judge erred when he refused to recuse himself from the Defendant's case; (3) the trial court erred when it refused to allow defense counsel to withdraw; and (4) the evidence was insufficient to support his convictions. Because the Defendant filed an untimely notice of appeal, we dismiss his appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Randy P. Lucas, Gallatin, Tennessee, for the Appellant, Mark Anthony King.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Cameron L. Hyder, Assistant Attorney General; L. Ray Whitley, District Attorney General; and Charles Ronald Blanton, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Analysis

Initially, we must address the procedural history of this case. The State contends the Defendant's appeal should be dismissed because the Defendant not only failed to timely file a notice of appeal but also failed to explain how this Court's waiving his late filing is in the interest of justice. *See* Tenn. R. App. P. 4(a). The Defendant, as the State correctly notes, does not address the late filings of his motion for new trial or notice of appeal.

This case arises from the Defendant's evasion of arrest and reckless endangerment of his infant child. The record reflects that in January 2007 a Sumner County grand jury indicted the Defendant for four counts of aggravated assault and one count each of evading arrest, reckless endangerment with a deadly weapon, driving without headlights, failure to obey a traffic control device, and driving without a license. In September 2007 a Sumner County jury convicted the Defendant of felony evading arrest and reckless endangerment, and the trial court imposed an effective eight-year sentence. The trial court filed the Defendant's judgment form and sentencing order on October 1, 2007. The Defendant filed a motion for new trial on November 1, 2007, raising the four issues he maintains on appeal. The trial court conducted a hearing and denied the motion by written order on December 11, 2007. On December 31, 2007, the Defendant filed his notice of appeal.

The Tennessee Rules of Appellate Procedure require us to determine whether we have jurisdiction in every case on appeal. *See* Tenn. R. App. P. 13(b). In criminal cases, an appeal as of right lies from a final judgment of conviction. Tenn. R. App. P. 3(b). Filing a notice of appeal within thirty days of the final judgment date initiates this appeal; however, this Court has authority to waive "in the interest of justice" the untimely filing of a defendant's notice of appeal. Tenn. R. App. P. 4(a). If a timely motion for new trial under Tennessee Rule of Criminal Procedure 33(b) is filed, however, "the time for appeal . . . shall run from entry of the order denying a new trial" Tenn. R. App. P. 4(c).

Tennessee Rule of Criminal Procedure 33(b) provides that a party requesting a new trial must file his request within thirty days of the entry of the order of his sentence. Tennessee Rule of Appellate Procedure 3(e) provides that, in all cases tried by a jury, a defendant waives any issue relating to an "action committed or occurring during the trial . . . or other ground upon which a new trial is sought" unless the defendant raises such issue in a motion for a new trial. *See State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994). Unlike the untimely filing of a notice of appeal, this Court does not have authority to waive the untimely filing of a motion for new trial. *State v. Stephens*, 264 S.W.3d 719, 728 (Tenn. Crim. App. 2007); *see* Tenn. R. App. P. 4(a). Also, because this provision is mandatory, the time for filing may not be extended. *See* Tenn. R. Crim. P. 45(b); *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997). Further, the untimely filing of a motion for new trial does not toll the time for filing a notice of appeal; therefore, a late-filed motion for new trial will generally result in an untimely notice of appeal. *State v. Patterson*, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997).

We agree with the State that the Defendant's motion for a new trial was untimely. The Defendant's motion for new trial, filed on November 1, 2007, was filed thirty-one days after the trial court filed his sentencing order. His motion for new trial, therefore, was filed one day late. *See* Tenn. R. Crim. P. 33(b). The trial court considered and ruled on the Defendant's motion for new trial even though it was untimely. The trial court's jurisdiction to grant the Defendant a new trial, however, expired thirty days after it entered his sentencing order. *Martin*, 940 S.W.2d at 569; *Stephens*, 264 S.W.3d at 728. As such, the trial court had no jurisdiction to hear the Defendant's motion for a new trial, and the order issued denying a new trial was a nullity and "does not validate

the motion.” *Martin*, 940 S.W.2d at 569.

We conclude the Defendant, by failing to file a timely motion for new trial, waived review of his objections to the trial court’s refusals to remand the Defendant’s case for a preliminary hearing, to recuse himself from the Defendant’s case, and to allow defense counsel to withdraw from the Defendant’s case. *See* Tenn. R. App. P. 4(e); *Keel*, 882 S.W.2d at 416. Although one of the Defendant’s issues, the sufficiency of the evidence, need not be raised in a motion for new trial in order to secure appellate review, there is no automatic appeal of this issue to this Court. *State v. Boxley*, 76 S.W.3d 381, 389 (Tenn. Crim. App. 2001). In order to perfect an appeal, either the Defendant must timely file a notice of appeal, or this Court must waive a timely filing of a notice of appeal. *Id.*

The Defendant’s notice of appeal, filed on December 31, 2007, also was untimely. The thirty-day period specified in Rule 4(a) of the Tennessee Rules of Appellate Procedure for filing a timely notice of appeal began to run on October 1, 2007, when the trial court entered the Defendant’s sentencing order, and ended on October 31, 2007. The Defendant’s notice of appeal, therefore, was filed sixty-one days after this period ended. *See* Tenn. R. App. P. 4(a). Further, his late-filed motion for new trial did not toll the time for filing his notice of appeal. *Patterson*, 966 S.W.2d at 440. As a result, the Defendant’s notice of appeal was untimely and, without more, his objection to the sufficiency of the evidence supporting his conviction is beyond our review. *See Boxley*, 76 S.W.3d at 389

This Court has authority to waive “in the interest of justice” the timely filing of the Defendant’s notice of appeal. Tenn. R. App. P. 4(a). The Defendant, despite receiving the State’s brief pointing out the Defendant’s late filings, has not sought waiver “in the interest of justice” of the timely filing requirement of the notice of appeal. *See* Tenn. R. App. P. 4(a). He fails to address his late filing or explain how waiving the timely filing of his notice of appeal serves the interest of justice. Our independent review of the record reveals no indication that waiver of the Defendant’s late notice of appeal would serve the interest of justice.

Given the untimeliness of the Defendant’s notice of appeal, we conclude that no appeal is properly before this Court. As such, the Defendant’s appeal is dismissed.

II. Conclusion

After a thorough review of the record and relevant authorities, we conclude the Defendant failed to file a timely notice of appeal and that the interest of justice does not require a waiver of the Defendant’s untimely filing. This appeal is dismissed.

ROBERT W. WEDEMEYER, JUDGE